LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
NOV 27 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

APPELLEES' BRIEF

HALL HAMMOND,
Attorney General,
HARRISON L. WINTER,
Asst. Attorney General,
Attorneys for Appellees,
1901 Mathieson Building,
Baltimore 2, Maryland.

The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. The Tax Here Assailed is a Franchise Tax in Lieu of All Other State Taxes and Does Not Contravene The Import-Export Clause of the Federal Constitution	8
II. Even If The Tax Here Assailed is Construed as a Direct Tax on Gross Receipts Derived from the Importing and Exporting Process, the Tax Does Not Contravene the Import-Export Clause of the Federal Constitution	23
(a) Cases Sustaining Taxes Against Import-Export Clause Attack	26
(b) Cases Invalidating Taxes Because of Import-Export Clause Attack	30
(1) Cases Involving Direct Taxes on Imports and Exports	30
(2) Cases Involving Taxes on the "Process" of Importing and Exporting	33
(3) The Richfield Case and Subsequent Decisions	39
CONCLUSION	52

Table of Citations

Cases

	PAGE
Alabama v. King & Boozer, 314 U. S. 1 (1941)	48
Almy v. California, 65 U. S. 169 (1861)	34-35, 37
American Manufacturing Company v. St. Louis, 250 U. S. 459 (1919)	10
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218 (1933)	19, 31
Brown v. Maryland, 12 Wheat. 419 (1827)	15, 18, 20, 23-24, 30, 31, 33
Central Greyhound Lines v. Mealey, 334 U. S. 653 (1948)	21
Commonwealth v. Bayuk Cigars, 359 Pa. 210, 58 A. (2d) 445	18, 19
Cooley v. Board of Wardens, 12 How. 299 (1851)	26-27
Cornell v. Coyne, 192 U. S. 418 (1904)	27, 28
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917)	18, 20, 31
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918)	10, 11-12
Cumberland & Pa. R. R. Co. v. State, 92 Md. 668 (1901)	8
Curry v. United States, 314 U. S. 14 (1941)	48
Educational Films Corp. v. Ward, 282 U. S. 379 (1931)	48, 49
Empresa Siderurgica, S. A. v. County of Merced, 337 U. S. 154 (1949)	39, 44
Fairbanks v. United States, 181 U. S. 283 (1901)	35, 37, 45
Ficklen v. Taxing District of Shelby County, 145 U. S. 1 (1892)	10
Flint v. Stone Tracy Co., 220 U. S. 107 (1911)	48-49
Freeman v. Hewit, 329 U. S. 249 (1946)	21
Galveston, Harrisburg, San Antonio Rwy. Co. v. Minnesota, 210 U. S. 217 (1908)	10, 11, 22

	PAGE
Graves v. New York, 306 U. S. 466 (1939)	48
Great Northern Rwy. Co. v. Minnesota, 278 U. S. 503 (1929)	10, 12
Hiawasee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 344 (1920)	6
Helvering v. Gerhardt, 304 U. S. 405 (1938)	48
Home Insurance Co. v. New York, 134 U. S. 594 (1890)	48, 49
Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)	33
Howell v. State, 3 Gill 14 (1845)	14
Illinois Central Rwy. Co. v. Minnesota, 309 U. S. 157 (1940)	10, 22
Inter-Island Steam Nav. Co. v. Territory of Hawaii, 9 cir., 96 F. (2d) 412 (1938); affirmed 305 U. S. 306 (1938)	50, 51
Interstate Oil Pipe Line v. Stone, 337 U. S. 622, 669-682 (1949)	21
Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947)	39, 41
Joy Oil Co. v. State Tax Commission, 337 U. S. 286 (1949)	39, 45
Maine v. Grand Trunk R. R. Co., 142 U. S. 217 (1891)	10, 22, 49
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940)	21, 22
Nashville v. Browning, 310 U. S. 362 (1940)	16
National Paper & Type Co. v. Bowers, 266 U. S. 373 (1924)	30
New York, ex rel Parke, Davis & Co. v. Roberts, 171 U. S. 658 (1898)	18, 27
New York v. Wells, 208 U. S. 14 (1908)	13, 14
Northwestern Life Ins. Co. v. Wisconsin, 247 U. S. 132 (1918)	10
Ohio River & W. R. Co. v. Dittey, 232 U. S. 576 (1914)	16
Peck & Co. v. Lowe, 247 U. S. 165 (1918)	29, 49

	PAGE
People, ex rel American Soda Fountain Co. v. Roberts, 158 N. Y. 168, 52 N. E. 1104 (1899)	19
Phila. & So. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887)	20, 21
Postal Cable Co. v. Adams, 155 U. S. 688 (1895)	22
Postal Telegraph Cable Co. v. Harford Co., 131 Md. 96 (1917)	8
Richfield Oil Corp. v. State Board, 329 U. S. 69 (1946)	20, 22, 39, 40, 41, 42, 43, 44, 46
Rogan v. B. & O. Railroad Co., 188 Md. 44 (1947)	8
Selliger v. Kentucky, 213 U. S. 200 (1909)	35, 36
Spalding & Bros. v. Edwards, 262 U. S. 66 (1923)	32, 40
State v. B. & O. R. R. Co., 48 Md. 49 (1878)	8
State v. Central Trust Co., 106 Md. 268 (1907)	8
State v. U. S. F. & G. Company, 93 Md. 314 (1901)	8
State Freight Tax Case, 15 Wall. 232 (1873)	20
State Tax Comm. v. Western Md. Railway Co., 188 Md. 240 (1947)	8
State Tax on Railway Gross Receipts Case, 15 Wall. 284 (1873)	10, 20
Thames & Mersey Marine Ins. Co. v. United States, 237 U. S. 19 (1915)	37-38, 45
Thomas v. Iowa, 209 U. S. 258 (1908)	6
United States Express Co. v. Minnesota, 223 U. S. 335 (1912)	10, 11
United States v. Hvoslef, 237 U. S. 1 (1915)	36-37, 38, 45
W. P. & Cincinnati Transport Co. v. Wheeling, 98 U. S. 273 (1879)	13-14, 27
White River Lumber Co. v. Arkansas, ex rel Appelgate, 279 U. S. 692, 700 (1929)	
Whitney v. California, 274 U. S. 357, 362-3 (1927)	

Statutes

	PAGE
Acts of 1945, Chapter 965	16
Acts of 1947, Chapter 677	16
Acts of 1949, Chapter 42	9
Annotated Code of Maryland (1939 Ed.):	
Article 81:	
Section 96	2
Section 194(b)	3
Annotated Code of Maryland (1943 Supp.):	
Article 81:	
Section 7(15)	9
Section 95	2, 4, 5, 9
Section 98	8
Annotated Code of Maryland (1947 Supp.):	
Article 81:	
Section 7(15)	16
Section 25(h)	16
Section 94½	16
Section 95	16
Section 144	8, 9
Section 223(m)	9
Federal Income Tax Act of 1913	29
U. S. C. A., Title 28, Section 1257(2)	4, 5
United States Constitution:	
Article 1:	
Section 8 (Commerce Clause)	4, 10, 12, 20, 22, 23, 25, 34, 40, 41, 42, 45, 47
Section 9, Clause 5	28

PAGE

Section 10, Clause 2 (Import-Export Clause) 3, 4, 5, 7, 8, 9, 12, 13, 14, 17, 19, 20, 22, 23, 24, 25, 28, 29, 30, 32, 33, 34, 39, 40, 41, 42, 43, 44, 45, 47, 49, 50, 51, 52

War Revenue Act of 1898 36

Miscellaneous

Powell, More Ado About Gross Receipts Taxes, 60 Harvard Law Review 501 (1947) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

No. 205

WESTERN MARYLAND RAILWAY COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHINS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND,
Appellees.

APPELLEES' BRIEF

OPINION BELOW

The Opinion of the Court of Appeals has not been officially reported. It may be found, however, in 73 A. (2d) 12.

JURISDICTIONAL STATEMENT

These are two appeals from a decree of the Court of Appeals of Maryland, in a consolidated case, affirming decrees of the Circuit Court No. 2 of Baltimore City, which sustained final assessments made against both Appellants by the Maryland State Tax Commission for gross receipts taxes imposed by Section 95 of Article 81 of the Annotated Code of Maryland (1943 Supplement). In the case of the Appellant Canton Railroad Company (hereinafter called "Appellant Canton"), the assessment was made on gross receipts earned in the calendar year 1946. In the case of the Appellant Western Maryland Railroad (hereinafter called Appellant "Western Maryland"), the assessment was made on gross receipts earned in the calendar years 1945 and 1946.

Section 95 of Article 81, *supra*, quoted at length in both of the Appellants' briefs, imposes a franchise tax upon railroad companies measured by their gross receipts derived from activities carried on solely within the physical confines of the State of Maryland. Predecessor statutes have imposed a like tax since 1872 without objection on the grounds urged here. An annual report of such receipts is required to be made to the Maryland State Tax Commission by Section 96 of Article 81 of the Annotated Code of Maryland (1939 Edition). Pursuant to the applicable statutory procedure, the Appellees made a tentative assessment of the gross receipts tax liability of both Appellants. Before this tentative assessment could become final, the Appellant Canton applied to the Appellees for a reduction of the tentative assessment in an amount equal to its gross receipts and operating revenues derived from its import and export business and operations in foreign commerce. The Appellant Western Maryland protested the inclusion of

gross receipts earned from transportation service to imports and exports in the measure of the tax and filed amended returns for the years in question, eliminating gross receipts derived from the transportation of imports and exports.

The Appellees conducted a formal hearing with respect to the protests of the Appellant Canton and the Appellant Western Maryland and, in reliance on an opinion of the Attorney General of Maryland, rejected the contention of both Appellants that the inclusion of gross receipts and operating revenues derived from the transportation of imports and exports contravened Article I, Section 10, Clause 2 of the Constitution of the United States (hereinafter called the "Import-Export Clause").

Both Appellants, in accordance with Section 194(b) of Article 81 of the Annotated Code of Maryland (1939 Edition), entered appeals to the Circuit Court No. 2 of Baltimore City, where the contention that the inclusion of gross receipts and operating revenues derived from transportation imports and exports contravened the Import-Export Clause of the Constitution of the United States was renewed. The Circuit Court No. 2 of Baltimore City, after consideration of the record of the hearing before the Appellees and extensive argument thereon, duly filed written opinions deciding that the final assessment made by the Appellees against the Appellant Canton for the year 1947 (on gross receipts earned during the calendar year 1946) and the final assessment made against the Appellant Western Maryland in the years 1946 and 1947 (on gross receipts earned in the calendar years 1945 and 1946) were valid and did not contravene the Import-Export Clause of the Constitution of the United States. Further appeals were taken by both Appellants from these decisions to the Court of Appeals of Maryland, the highest Court of the State of

Maryland, where it was again contended that the inclusion of gross receipts and operating revenues derived from the transportation and handling of imports and exports in the measure of the tax was a violation of the Import-Export Clause of the Constitution of the United States. The appeals were consolidated and the Court of Appeals (two of its six members dissenting) entered its opinion and order holding, in substance, that the assessments of the Appellees did not contravene the Import-Export Clause.

This Court's jurisdiction is invoked under the provisions of Section 1257(2) of Title 28, U. S. C. A., upon the alleged ground that the gross receipts tax imposed by Section 95 of Article 81, *supra*, in so far as it applies to gross receipts and operating revenues derived from the transportation of imports and exports contravenes Article 1, Section 10, Clause 2 of the Constitution of the United States.

In this Court, for the first time, the Appellant Canton makes the contention that Article I, Section 8 of the Constitution of the United States (the Commerce Clause) is also violated by Section 95 of Article 81, *supra*. The record is clear that this contention was not presented to nor considered by the Appellees as constituting the State Tax Commission of Maryland, the Circuit Court No. 2 of Baltimore City or the Court of Appeals of Maryland. The Agreed Statement of Facts entered into between the Appellant Canton and the Appellees shows that before the Appellees, as constituting the State Tax Commission of Maryland, the only contention made was "* * * that a gross receipts tax calculated on an assessment which included such gross receipts and operating revenues [that is gross receipts and operating revenues derived from import and export business and operations in foreign commerce], would contravene the said Import-Export Clause of the Constitution of the United States" (Canton R. 19). Before

the Circuit Court No. 2 of Baltimore City, the Agreed Statement of Facts shows that the only contention made was that the operating revenues and gross receipts derived by the Appellant Canton in the calendar year 1946 derived from the Appellant Canton's import and export business "* * * contravened the Import-Export Clause of the United States Constitution" (Canton R. 30). The majority opinion of the Court of Appeals of Maryland similarly discloses that the only contention presented and decided was with respect to certain portions of the gross receipts of both Appellants, and particularly whether those "* * * portions alleged to have been derived from their services rendered 'in the importing and exporting process' should not have been included within the total amount of the gross receipts subject to the tax" because of an alleged immunity afforded by Article I, Section 10, Clause 2 of the Constitution of the United States (Canton R. 36). The dissenting Judges of the Maryland Court of Appeals, moreover, found that the record before them did not present any contention founded upon the Commerce Clause (Canton R. 50).

While this Court undoubtedly has jurisdiction under Section 1257(2) of Title 28, U. S. C. A., with respect to the validity of the application of the tax imposed by Section 95 of Article 81, *supra*, to the operating revenues and gross receipts derived by both Appellants for the transportation within the State of Maryland of imports and exports, the issue presented to this Court is limited to that narrow point and does not include possible considerations of the effect of the Commerce Clause of the Constitution of the United States asserted for the first time in the Appellant Canton's Assignment of Errors, *White River Lumber Co. v. Arkansas, ex rel. Appelgate*, 279 U. S. 692, 700 (1929);

Whitney v. California, 274 U. S. 357, 362-3 (1927); *Hiawasee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 341, 344 (1920); *Thomas v. Iowa*, 209 U. S. 258 (1908).

STATEMENT OF THE CASE

The Appellees accept the statement of the case contained in the brief of each of the Appellants. They point out, however, that neither Appellant is engaged in manufacturing, buying or selling goods which are either imported or exported. Both Appellants are engaged solely in affording transportation and related services, under instructions from others who are engaged in buying and selling imports and exports, to articles which, in the geographical sense, will become exports or have been imported. The formulation and control of shipping instructions given to the Appellants with respect to these articles rests exclusively in others.

The activities of the Appellants which produce the gross receipts claimed to be exempt from taxation were all carried on solely within the physical confines of the State of Maryland. These activities were performed in connection with, in the case of the Appellant Western Maryland, other general transportation activities conducted within and without the State of Maryland; but in the computation of the portion of the total gross receipts derived by the Appellant Western Maryland, subject to the Maryland gross receipts tax, the portion of total gross receipts earned by the Appellant Western Maryland without the State of Maryland has been eliminated. The Appellant Canton performs general transportation services in the State of Maryland, but no services outside the State.

SUMMARY OF ARGUMENT

I.

The gross receipts tax here assailed is by decision of the Court of Appeals of Maryland and proper construction of the statutes of the State of Maryland a franchise tax in lieu

of all other State taxes, except a purely nominal tax for the general franchise to be a corporation. It is proportionate in amount to the other State taxes which it supplants and which would be required to be paid by the Appellants were the franchise tax not paid. It is not a tax upon gross receipts as such, nor an occupation tax. Nothing contained in the Import-Export Clause of the Constitution of the United States, or in the decisions of this Honorable Court construing that clause, prohibits the imposition of an in lieu franchise or commutation tax measured by the gross receipts derived from transportation services performed solely within the physical confines of the State of Maryland to imports and exports.

The Appellant Western Maryland does not dispute that the gross receipts tax in question is an in lieu franchise or commutation tax. The Appellant Canton, however, claims, in the alternative, that the tax is not an in lieu franchise or commutation tax but that it is a privilege tax sought to be exacted for the granting of a privilege, which the State of Maryland is without constitutional authority to withhold, and that the tax is not comparable in amount to other State taxes which the Appellant Canton would otherwise be required to pay.

II.

Even if construed as a tax upon the gross receipts themselves rather than an in lieu franchise or commutation tax, the tax here assailed, as applied to gross receipts and operating revenues derived from transportation of imports and exports, does not contravene the Import-Export Clause of the Constitution of the United States. The tax is not upon the imports or exports nor upon any incident thereof so closely connected thereto as to constitute a tax upon the articles themselves. Under applicable decisions of this Honorable Court, the scope of the protection of the Import-

Export Clause of the Constitution of the United States falls short of the gross receipts derived by an independent carrier, having no interest in the goods, for transportation services afforded to such goods solely within the confines of the taxing State.

ARGUMENT

I.

THE TAX HERE ASSAILED IS A FRANCHISE TAX IN LIEU OF ALL OTHER STATE TAXES AND DOES NOT CONTRAVENE THE IMPORT-EXPORT CLAUSE OF THE FEDERAL CONSTITUTION.

In a long line of cases, the Court of Appeals of Maryland has held that the tax imposed by Section 98 of Article 81 of the Annotated Code of Maryland (1943 Supplement) is a franchise tax in lieu of all other State taxes, except the franchise tax imposed by Section 144 of Article 81 of the Annotated Code of Maryland (1947 Supplement) on the general franchise to be a corporation, *State v. B. & O. Railroad Co.*, 48 Md. 49 (1878); *Cumberland v. Pennsylvania Railroad Co.*, 92 Md. 668 (1901); *State v. U. S. F. & G. Co.*, 93 Md. 314 (1901); *State v. Central Trust Co.*, 106 Md. 268 (1907); *Postal Telegraph Cable Co. v. Harford County*, 131 Md. 96 (1917); *Rogan v. B. & O. Railroad Co.*, 188 Md. 44 (1947); *State Tax Commission v. Western Maryland Railway Co.*, 188 Md. 240 (1947). In the instant case, the Court of Appeals reviewed its prior holdings and reaffirmed their decisions. At the outset of its opinion, the Court stated: "This Court in a long line of cases has sustained the statutory declaration * * * that the tax here in question is a franchise tax in lieu of all other State taxes". The concluding sentence of the majority opinion in the instant case reads as follows: "* * * we see no reason why a franchise tax measured by gross receipts, including receipts for foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes".

Examination of the taxing laws of the State of Maryland patently shows that the Court of Appeals was correct. The tax imposed by Section 95 of Article 81 is specifically determined in the very language of the relevant portion of the statute "* * * as a franchise tax * * *". Moreover, the statutes imposing general State taxes make it abundantly clear that this franchise tax is in lieu of such other taxes. By Section 7(15) of Article 81 of the Annotated Code of Maryland (1943 Supplement) railroads, with respect to their railroad property, are exempted from the shares tax (a State tax on personal property) and the State real estate tax on their operating property, including land. All gross revenues used as a measure of the franchise tax imposed by Section 95 of Article 81, *supra*, are excluded, by Section 223(m) of Article 81 of the Annotated Code of Maryland (1947 Supplement), from gross income subject to the Maryland income tax. In short, the only State property tax which the Appellants are required to pay is the general tax on corporate franchises measured by Section 144 of Article 81 of the Annotated Code of Maryland, as amended by Chapter 42 of the Acts of the General Assembly of Maryland of 1949. This tax is purely nominal in amount, for on a capitalization of $10,000,000, a tax of only $400 is imposed and an additional tax of $30 for each $2,000,000 of capitalization or fractional part thereof in excess of $10,000,000.

If it is assumed, solely for the purposes of argument, that a tax directly upon the gross receipts derived from the transportation of imports and exports within the State of Maryland would be prohibited by the Import-Export Clause of the Federal Constitution, it does not follow that a tax imposed *on the franchise* of a railroad *measured* by the gross receipts derived from that type of activity *in lieu of all other State taxes* is objectionable. In dealing with cases arising under the Commerce Clause, this Court has consist-

ently held that an in lieu franchise or commutation tax is not objectionable even though it be measured in part by gross receipts derived from activities in interstate commerce, which, in themselves, could not be directly taxed, if the amount of tax obtained thereby reasonably approximates the amount of property tax which the State could constitutionally exact. This principle is directly applicable to the cases at bar even though they arise under the Import-Export Clause of the Federal Constitution when the basis upon which it rests is laid bare.

That an in lieu franchise or commutation tax on apportioned gross receipts is not invalid under the Commerce Clause has been established by *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891), as explained in *Postal Cable Co. v. Adams*, 155 U. S. 688 (1895) and *Galveston, Harrisburg, San Antonio Railway Co. v. Texas*, 210 U. S. 217 (1908); *U. S. Express Co. v. Minnesota*, 223 U. S. 335 (1912); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132 (1918); *Great Northern Railway Co. v. Minnesota*, 278 U. S. 503 (1929); *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940). See also, *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1 (1892); *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1873); and *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919). The rationale of these cases is firmly established: A tax on property employed in interstate business is valid, and a tax in lieu of such a valid tax is itself valid if it amounts to a just substitute therefor, notwithstanding that the tax ultimately increases the cost of doing interstate business.

Reference need be made to only a few of the in lieu franchise or commutation tax cases to demonstrate that such taxes are sustained entirely on the principle that the tax is in substitution and a just equivalent for a property tax

as to which there could be no successful constitutional attack. For example, in the *Galveston* case, *supra*, the Court stated that an ad valorem property tax on real and personal property used in interstate commerce is valid. The Court then continued in characterizing earlier decisions by stating that "* * * taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged". In the *United States Express Company* case, *supra*, the Court, in sustaining an in lieu gross receipts tax said:

> "The right of the State to tax property, although it is used in interstate commerce is entirely well settled. * * * The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce. * * *
>
> " 'But whatever name the exaction may be called if it amounts to no more than the ordinary tax upon property, or a just equivalent therefore, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution.' * * *".

The *Cudahy Packing Company* case, *supra*, was concerned with a gross receipts tax imposed upon a freight line company doing an interstate business within the State of Minnesota. In sustaining the tax, the Court stated:

> "Insofar as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. * * * This is not questioned; but it is insisted that the tax imposed is not a property tax, but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. * * * On the other

> hand, if what is done is to reach the property, and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said: 'By whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce * * *."

Finally, in the *Great Northern Railway Company* case, *supra*, which was concerned with a tax measured by gross earnings in lieu of all other taxes upon property and in which the tax was sustained, it was stated:

> "* * * It is competent for the State to impose a tax upon the property of the company within the State and for that purpose to measure the value of such property in the way here provided. We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property'. * * *
>
> "Under these circumstances, upon principles established by numerous decisions of this court, the tax is not open to challenge as an exaction in violation of the Federal Constitution. * * *"

A direct analogy exists between the validity of in lieu franchise or commutation taxes under the Commerce Clause and the in lieu franchise or commutation tax in the cases at bar under the Import-Export Clause, because it has been made clear that ad valorem property taxes on both tangible and intangible personal property used in, or derived from, the import-export process are not prohibited by

the Import-Export Clause, *W., P. & Cincinnati Transport Co. v. Wheeling*, 98 U. S. 273 (1879); *New York v. Wells*, 208 U. S. 14 (1908) and it can be shown that the tax in the cases at bar is comparable in amount to the ad valorem taxes which the State of Maryland would otherwise impose.

The *Wheeling* case concerned the validity of a State tax upon vessels used in the import-export traffic. Briefly, the opinion shows that the City of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on every $100. of the assessed valuation thereof. An attack on the validity of the levy was made on the theory that the taxes amounted to a "duty of tonnage", prohibited by the clause of the Constitution of the United States next succeeding the Import-Export Clause and treated as having the same effect as the Import-Export Clause as appears from the Court's opinion. In its opinion, the Court stated:

> "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of these prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of Federal government * * *.
>
> "Taxes levied by a State upon ships or vessels as instruments of commerce and navigation are within the clause of the Constitution which prohibits the States from levying any duty of tonnage without the consent of Congress; * * *.
>
> * * * * * *
>
> "* * * Tonnage duties cannot be levied; but it is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of

the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.

* * * * * *

"Annual taxes upon ships and vessels for the support of the State Governments as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts, in refuting the authority of the States, to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property. * * *"

The Court referred to many of the texts upon the subject, as well as statements contained in various cases. It relied, *inter alia*, upon a decision of the Court of Appeals of Maryland in *Howell v. State*, 3 Gill 14 (1845), as authority for the proposition that vessels are subject to taxation by the states as personal property and the states' power in that respect is not superseded by the Import-Export Clause. The Court concluded that the tax which it was considering was a tax on personal property and that it was not a duty of tonnage prohibited by the Federal Constitution.

In the *Wells* case, *supra*, the City of New York assessed, for ad valorem personal property taxes, office furniture, cash on hand in bank, accounts receivable and accounts payable of a taxpayer engaged in the business of importing. In short the assessment was upon the capital of an importing business. The taxpayer resisted the assessment as to cash on hand and in bank, accounts receivable and accounts payable on the theory that the taxes were essentially taxes upon the sale of imports and in violation of the Import-Ex-

port Clause, as construed in *Brown v. Maryland*, 12 Wheat. 419 (1827). The taxpayer's contention was not sustained by the Court. In sustaining the validity of the tax, the Court stated:

> "The power of the State of New York to impose a tax upon the cash and these notes as capital employed in the business within the State, laying aside for the moment the question as to their character as proceeds of the sale of imports, cannot be doubted in view of the previous decisions of this court. * * *
>
> "The constitutional protection as we have seen, is intended to secure the right to bring in, and to sell in the original packages, the goods imported; and, that this right may not be impaired, direct taxes upon goods or license taxes for the privilege of sale cannot be levied; and the decision in Brown v. Maryland recognizes that the importers may lose this right of protection by mingling such goods with other property, and altering their character as importations in original packages, and making them by his conduct subject to the taxing power of the State. And we think the same principle may be applied to the proceeds of the sale of the goods, which, while not directly taxable as such, any more than the goods themselves, may be dealt with by the owner in such wise as to become subject to taxation as other property.
>
> * * * * * *
>
> "We think the constitutional protection afforded the importer against state action does not require the property thus held and used to be exempted from state taxation. * * *"

The Maryland franchise tax measured by gross receipts imposed in lieu of all other State taxes can be demonstrated to be proportionate in amount to other State taxes which the Appellants would be required to pay were not the tax in the case at bar imposed. In the Court of Appeals of Maryland, the Appellant Canton argued that the tax in the case

at bar was not comparable in amount to other State taxes. In its brief, it states that the tax is over "ten times greater than" ordinary ad valorem taxes (Appellant Canton Brief p. 28). The basis for the argument was the application of the ordinary rate of State taxes to the assessed value of the land and operating property of the Appellant Canton. The argument overlooked the effect of Chapter 965 of the Acts of the General Assembly of Maryland of 1945 (substantially reenacted, except as to rates, by Chapter 677 of the Acts of the General Assembly of Maryland of 1947 and codified as Sections 7(15), 25(h), 94½ and 95 of Article 81 of the Annotated Code of Maryland, 1947 Supplement).

These Acts were adopted by the General Assembly of Maryland pursuant to the constitutional authority of the State of Maryland to constitute railroad property a special class for tax purposes and to impose on such property a tax different in amount from the taxes imposed on other property throughout the State. *Nashville v. Browning*, 310 U. S. 362 (1940); *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576 (1914).

It was argued by the Appellees in the Court of Appeals of Maryland that when the rate of tax established by Chapter 965 and Chapter 677 of the Acts of the General Assembly of Maryland, *supra*, was applied to the admitted value of the Appellant Canton's property for the calendar year in which the tax under attack in the case at bar was imposed the amount of ad valorem taxes would be greater than the amount of the franchise tax sought to be sustained. The Court of Appeals adopted the Appellees' argument and said:

> "Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not proportionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State

taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7(15), 25(h), 94½ and 95 of Article 81, 1947 Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1000.00 'more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year.' Nashville C. & St. L. Ry. v. Browning, 310 U. S. 362. Ohio River & W. R. Co. v. Dittey, 232 U. S. 576."

It should be noted that this finding of the Court of Appeals of Maryland related only to ad valorem property taxes which the Appellant Canton would be required to pay. It did not take into consideration additional income taxes which the Appellant Canton would be required to pay were the gross receipts used as a measure for the franchise tax not deducted from its gross income subject to the Maryland Income Tax Law.

If a direct ad valorem tax on property used in the importing-exporting process and the proceeds derived from that process are not barred by the Import-Export Clause, and the Appellants do not suggest otherwise, *a fortiori*, it follows that a franchise tax in lieu of such direct ad valorem taxes is constitutionally valid, where, as has been shown, the franchise tax is comparable in amount to the ad valorem taxes which would have been imposed. The analogy urged by the Appellees is supported collaterally by past decisions of this Court.

A franchise tax, as applied to a foreign corporation doing business in New York, measured by the extent of capi-

tal, including imports in their original packages, was sustained in *New York, ex. rel. Parke, Davis & Co. v. Roberts*, 171 U. S. 658 (1898). It was argued that the tax could not be sustained at least insofar as based upon the value of imports stored in their original packages on the authority of *Brown v. Maryland, supra.* The Contention was rejected, however, the Court saying:

> "But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested * * *."

As late as 1948, in *Commonwealth v. Bayuk Cigars*, 359 Pa. 210, 58 A. (2d) 445, the *Roberts* case, *supra*, was cited with approval and relied on in sustaining a state franchise tax on a Maryland corporation measured by its capital when part of that capital consisted of imports in their original packages.

Also, it is interesting to note that in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917), where an annual mercantile license tax of $3.00, with an additional fee based upon a percentage of gross sales, was considered, the tax was condemned under the Import-Export Clause, as well as under the Commerce Clause because constituting a direct tax on sales. In condemning the tax, however, upon this dual basis, the Court was exceedingly careful to remark:

> "* * * So obvious is the distinction between this tax and those that were sustained in * * * (citing the in lieu franchise tax cases discussed *supra*) and some other cases of the same class, that no time need be spent upon it."

Needless to say, the tax considered in the *Crew Levick* case bore no semblance of the attributes of a franchise tax in lieu of other taxes. It is submitted, however, that this Court recognized that a gross receipts tax as a franchise tax in lieu of other taxes was valid even though, as the Appellees contend, it be assumed that the gross receipts themselves would not be taxable under the Import-Export Clause. See also the powerful and well reasoned dissents of Justice Cardozo, Brandeis and Stone in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218 (1933), who would have sustained a State franchise tax measured by the volume of business which consisted of selling imports in their original packages; and the New York case of *People, ex rel. American Soda Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104 (1899), which sustained a New York franchise tax measured in part by the value of articles to be exported.

The Appellants resist the application of the in lieu or commutation tax principle to the tax imposed in the cases at bar. They point to the words of the Import-Export Clause as prohibiting "any" tax on imports and exports. They argue that the prohibition against "any" tax applies to the whole "process" of importing and exporting and that when carried to its logical conclusion, the prohibition against "any" tax prohibits a franchise tax in lieu of all other State taxes measured, in part, by gross receipts derived from the "process" of importing and exporting, even though such tax be comparable in amount to the ad valorem State taxes which it supplants.

The Appellees, as will be more fully shown in the subsequent section of their argument, do not admit that a tax on the gross receipts of an independent carrier derived from services performed solely within the State of Maryland is prohibited by the Import-Export Clause when the articles

transported are imports and exports. However, if it be admitted that such a tax would be prohibited, such an admission does not prohibit or in any way detract from direct application of the in lieu or commutation tax principle. Such can easily be demonstrated by reference to the history of the development of the in lieu or commutation tax principle and current judicial principles at that time.

As was pointed out in *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946), the Import-Export Clause and the Commerce Clause have at times been construed identically. For example, in *Brown v. Maryland*, 12 Wheat. 49 (1827) and *Crew-Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917), the Import-Export Clause and the Commerce Clause were treated as having the same effect.

To be sure, the in lieu or commutation tax cases were all specifically decided under the Commerce Clause. But they were decided at a time when the Commerce Clause was construed without qualification to prohibit all direct gross receipts taxes on gross receipts derived from interstate commerce. In the *State Freight Tax Case*, 15 Wall. 232 (1873), a Pennsylvania tax on freight, including interstate freight, at graduated rates per ton on different articles was held valid. In an opinion by the same Justice who delivered the opinion in the *State Freight Tax Case*, the *State Tax on Railway Gross Receipts Case*, 15 Wall. 284 (1873), held valid a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. These cases were essentially irreconcilable and the holding in the *State Tax on Railway Gross Receipts Case* was put to rest and, in effect, overruled in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887). Thereafter, during the entire period that the in lieu or commutation

tax cases were decided, the State of the law was crystal clear that no State could constitutionally impose a gross receipts tax directly on gross receipts derived from interstate commerce.

The state of the law is succinctly described in Powell, *More Ado About Gross Receipts Taxes*, 60 Harvard Law Review 501 (1947), as follows:

> "Prior to the decision in the *Berwind-White* case in 1940 and its possible foreshadowing in Mr. Justice Stone's opinion in the *Western Live Stock* case two years earlier, the canonical capsules for commerce-clause limitations on state taxation of gross receipts from interstate transportation and interstate sales were tolerably clear, notwithstanding frequent disagreements and possible disparities in the judicial prescriptions of the powders put inside them. The tax was adjudged invalid if it were determined to be imposed on such interstate transportation or interstate sale or on the gross receipts from transportation, communication, or sale. * * *" (Footnotes omitted).

As pointed out by Professor Powell, not until the decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) and subsequent cases was there any departure from this ruling. Compare, however, *Freeman v. Hewit*, 329 U. S. 249 (1946); *Central Greyhound Lines v. Mealey*, 334 U. S. 653 (1948). See also, as to the present state of the law, the opinion of Mr. Justice Reed, concurred in by the Chief Justice, Mr. Justice Frankfurter and Mr. Justice Jackson in *Interstate Oil Pipe Line v. Stone*, 337 U. S. 622, 669-682 (1949).

Thus, from 1887, the date of the decision in *Philadelphia and Southern Steamship Co. v. Pennsylvania*, *supra*, until at least 1940, gross receipts from interstate commerce were

sacrosanct as far as the constitutional right of any State to impose a direct tax thereon. Yet, during this entire period, the in lieu or commutation tax cases from *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217 (1891), as explained in *Postal Cable Co. v. Adams*, 155 U. S. 688 (1895) and *Galveston, Harrisburgh & San Antonio Railway Co. v. Texas*, 210 U. S. 217 (1908) to *Illinois Central Railway Co. v. Minnesota*, 309 U. S. 157 (1940) were decided.

The Appellants rely upon *Richfield Oil Corporation v. State Board*, 329 U. S. 69 (1946), as authority for the proposition that the Commerce Clause technique, namely—the in lieu or commutation tax principle, cannot be applied to cases arising under the Import-Export Clause. While the *Richfield* case holds that the two constitutional provisions while related are not co-terminus and that qualifications may be written into the Commerce Clause which may not be written into the Import-Export Clause, that holding must be read in terms of exceptions recognized to exist in the absolute protection afforded by the Commerce Clause since the decision of this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940). The *Richfield* case, however, does not indicate that in lieu or commutation tax principle is not applicable to gross receipts tax cases arising under the Import-Export Clause because that principle was developed against a background the same absolute prohibition by the Commerce Clause of any State taxes directly on gross receipts derived from interstate commerce which the Appellants claim is now afforded by the Import-Export Clause.

Thus, it appears that by the statute and Court decisions the Maryland gross receipts tax is a franchise tax imposed

in lieu of all other State taxes. It is comparable in amount to the rate at which the property would have been taxed if ad valorem taxes were imposed. Under such circumstances, State taxes have been sustained against attack based upon the Commerce Clause upon the theory that, if the ad valorem tax would have been permitted, an in lieu type of gross receipts tax comparable in amount is constitutionally valid. With respect to contentions based upon the Import-Export Clause, it has been determined that ad valorem property taxes are immune to constitutional attack. By judicial authority and direct analogy to the in lieu or commutation tax cases arising under the Commerce Clause, it is submitted the tax in the instant cases should be sustained.

II.

EVEN IF THE TAX HERE ASSAILED IS CONSTRUED AS A DIRECT TAX ON GROSS RECEIPTS DERIVED FROM THE IMPORTING AND EXPORTING PROCESS, THE TAX DOES NOT CONTRAVENE THE IMPORT-EXPORT CLAUSE OF THE FEDERAL CONSTITUTION.

It is the Appellees' contention that the reserved power of the State of Maryland to tax subjects and objects within its confines applies in the cases at bar to that portion of the gross receipts received by the Appellants claimed to be received from the "process" of importing and exporting The Appellees' contention and the Appellants' contentions in this respect call for a consideration of the extent of the State of Maryland's power to tax and a precise delineation on the facts presented by the cases at bar of the scope of the prohibition against State taxation contained in the Import-Export Clause of the Federal Constitution.

It is well to consider the historic words of Chief Justice Marshall in this connection, as set forth in *Brown v. Mary-*

land, 12 Wheat. 419 (1827). That case concerned an Act of the Maryland Legislature, which imposed on all importers of foreign articles the requirement of a license to be had by payment of a license fee. The validity of the tax was assailed on the theory that it constituted a duty on imports. In support of the tax, it was argued that the Import-Export Clause had no application and the conceded power of the State of Maryland to tax subjects and objects within its jurisdiction was not thereby limited. Chief Justice Marshall said in this respect:

> "It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibtion beyond the object the constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.
>
> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. *The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the dis-*

> *tinction between them. Yet the distinction exists, and must be marked as the cases arise.* Till they do arise, it might be premature to state any rule as being universal in its application. * * *" (Italics supplied.)

If the tax here assailed is construed as a tax directly on gross receipts derived from the transportation within the State of Maryland of articles previously imported or articles to be exported, the essential problem presented to this Court is whether the scope of the prohibition contained in the Import-Export Clause against "any" tax includes such a tax.

The Appellants' argument may be divided into two steps. They argue that the transportation services which they perform are part of the "process" of importing and exporting and, secondly, that the entire "process" of importing and exporting is by decision of this Court tax immune. In this respect, the Appellants fall into the error with which they charge the Appellees; namely, application of the Commerce Clause technique, which is founded upon the general grant of power to the Congress to regulate commerce, itself a process, to a provision of the Federal Constitution prohibiting taxes on certain designated articles. Of course, the Appellees do not contend at this time that the Import-Export Clause affords tax immunity only to physical imports and exports. It is clear that such immunity extends not only to the objects themselves but to incidents thereof so closely related thereto that a tax imposed on such incidents *amounts to a tax on the articles themselves.* In dealing with the decisions of this Court construing the Import-Export Clause, it is clear, however, that this is the terminus of the exemption line and that each of the component parts of the "process" of importing and exporting, is not, as such, necessarily tax exempt.

To establish the validity of the Appellees' contention, it is necessary to consider those cases which have sustained the validity of various types of taxes against attacks based upon the Import-Export Clause, those cases which have declared invalid various types of taxes because of the Import-Export Clause, and particularly those authorities especially relied upon by the Appellants, as well as those cases applying the controlling principle to other, though analogous, sets of fact.

(a) Cases Sustaining Taxes Against Import-Export Clause Attack

One of the earlier and more celebrated decisions of this Court was concerned with an attack on the validity of an Act of the Pennsylvania Legislature regulating the use of pilots and fixing pilotage fees and fees to be paid when pilots were not used, based upon the alleged effect of the Import-Export Clause, *Cooley v. Board of Wardens*, 12 How. 299 (1851). As before stated, the Act in question required vessels above a certain size sailing from or bound to any port not within the Delaware River to take on a pilot and to pay appropriate pilotage fees. The Act further provided that if the master of any ship shall refuse or neglect to take on a pilot, he shall pay a sum equal to half of the pilotage to be used for the Society of the Relief of Distressed and Decayed Pilots, Their Widows and Children.

Attack was made on the validity of the Act upon the ground, *inter alia*, that it imposed imposts or duties on imports or exports and duties on tonnage as prohibited by the Federal Constitution. These contentions, however, were overruled. The Court saying:

> "* * * we cannot yield our assent to the argument, that this provision of law is in conflict with the second and third clauses of the tenth section of the first article

of the Constitution, which prohibit a state, without the assent of Congress, from laying any imposts or duties on imports or exports or tonnage. *This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes;* and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; * * *." (Italics supplied.)

Reference has been made at an earlier point in this brief to the cases which have sustained ad valorem property taxes imposed upon vessels in importing and exporting and upon the capital employed in an importing business, *W. P. & Cincinnati Transport Co. v. Wheeling*, 98 U. S. 273 (1879); *New York v. Wells*, 208 U. S. 14 (1908).

Not even every article to be exported is immune from an ad valorem property tax, as is shown by *Cornell v. Coyne*, 192 U. S. 418 (1904). That case was concerned with a nondiscriminatory tax imposed by the United States upon filled

cheese. The tax was imposed upon the manufacturers of the filled cheese.

The contention was made that the tax was prohibited because of the limitation on the power of Congress to impose taxes or duties on articles exported from any State contained in the fifth paragraph of Section 9 of Article I of the Federal Constitution, which, of course, limits the taxing power of Congress in the same manner as the Import-Export Clause limits the taxing power of the States. After reciting the text of the constitutional prohibition limiting the taxing power of Congress, the Court stated:

> "But this means that no burden shall be placed on exportation, and does not require that any bounty be given therefor. Congress has power to encourage exportation by remitting taxes on goods manufactured at home as it has power to encourage manufacturers by duties on imports, yet the Constitution does not compel it to do either the one or the other. * * * Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax on or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export. While that which is asked in this case is the return of a manufacturing tax, there is nothing in the constitutional provision to distinguish between manufacturing and other taxes, and if the plaintiff's contention be sustained as to a manufacturing tax it would follow that the government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest

upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. * * *"

Similarly, it is now well settled that the net proceeds of a taxpayer directly engaged in the business of importing and exporting are not immune to an income tax by operation of the Import-Export Clause or the clause prohibiting Congress from levying duties on exports. In *Peck & Co. v. Lowe*, 247 U. S. 165 (1918), the Federal Income Tax Act of 1913 as applied to a domestic corporation chiefly engaged in buying goods in the several States shipping them to foreign countries and there selling them was attacked, the contention being made that Congress was without power to impose a tax on the income derived thereby by virtue of the constitutional prohibition prohibiting it from levying imposts or duties on exports.

In its opinion, the Court examined at length cases which had sustained and cases which had held invalid taxes attacked under the Import-Export Clause and the prohibition against the levy by Congress of imposts or duties on exports. It then stated:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in the course of exportation, or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax * * * it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. * * * At most, exportation is affected only indirectly and remotely. * * *"

While the *Peck* case was concerned with the provision of the Constitution limiting the power of Congress to tax,

the same result was reached in *National Paper & Type Co. v. Bowers*, 266 U. S. 373 (1924), with respect to a New York income tax imposed upon a domestic corporation engaged in the business of purchasing articles in the United States, transporting them to foreign countries and there selling them, against the contention that the States' power transgressed the prohibition of the Import-Export Clause.

(b) Cases Invalidating Taxes Because of Import-Export Clause Attack

While some of the ultimate limits of the protection afforded by the Import-Export Clause have been clearly shown by the cases referred to above, there are, conversely, a body of cases which show what types of taxes fall directly within the prohibition contained in the Import-Export Clause. These cases divide themselves into two groups. The first, taxes directly against an object itself. There, the problem is presented whether the object itself constitutes an import or an export within the meaning of the constitutional prohibition. Other cases invalidate taxes which, to varying degrees, although purporting to be taxes on other than imports or exports, in fact, constitute taxes upon objects which are imports or exports. Cases involving taxes of the first type are so clearly distinguishable from the Maryland gross receipts tax that they may be disposed of summarily.

(1) Cases Involving Direct Taxes on Imports and Exports

The earliest case involving a tax of this type was *Brown v. Maryland*, *supra*. The tax in this case purported to be a license tax on the occupation of importing. However, so far as the decision of the Court invalidating the tax is concerned, the tax was treated as an actual tax upon imports themselves. The case defined the since often-repeated origi-

nal package doctrine, in that it held that a direct tax on an import as such was invalid so long as the import was within the geographical confines of the United States in the original package or same form as that in which it entered the United States. "All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself."

Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917), concerned an annual mercantile license tax enacted by Pennsylvania in the amount of $3.00 and a certain percentage of gross receipts. A taxpayer engaged in the business of purchasing commodities within the United States and selling them in foreign countries attacked the validity of the tax on the theory that it constituted a regulation of foreign commerce and an impost upon exports. The taxpayer's contentions were adopted and the tax invalidated. The Court concluded that because the tax was imposed on the business of selling goods in foreign commerce and was based upon a gross receipt of sales it constituted "* * * a tax upon such commerce * * * in effect an impost or duty upon exports".

Similarly, on the basis that it constituted, as recognized by decisions of the State Court, a tax on imports, the tax was invalidated in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U. S. 218 (1933). There, a tax, construed by the Courts of Alabama to be not a franchise tax but a tax on the actual doing of business, was sought to be exacted from a corporation whose only business activities in the State of Alabama were the importing, storage and sale of nitrate in the form and packages in which it was put up abroad and transported into the United States. The decision in *Brown v. Maryland, supra*, was relied upon for the proposition that a tax on the sale of an article imported only for

sale is a tax on the article itself, and, on that basis, the tax was held to be a direct tax on imports themselves and hence invalid. *It is interesting to note that Justices Cardozo, Brandeis and Stone dissented upon the theory that under a proper construction of the State Court's decision concerning the nature of the tax it constituted a valid tax on the franchise of the taxpayer, measured by the value of its gross business.*

Spalding & Bros. v. Edwards, 262 U. S. 66 (1923), concerned a sales tax on baseballs. The tax was imposed by the State of New York under circumstances where the taxpayer had entered into an agreement to sell the baseballs and ship them to Venezuela. The taxpayer had marked the goods for delivery to the purchaser in Venezuela and delivered them to a carrier, from which it received a receipt, later exchanged for an export bill of lading.

The question involved was, of course, whether the tax was prohibited by the Export Clause of the Federal Constitution. In deciding this question, the Court pointed out, although the tax was non-discriminatory it would not thus be added if it was, in fact, a tax on articles exported from the State. The Court then stated that since it was concerned with a tax *on an object itself* "* * * we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin". Upon a consideration of all of the facts which showed that the "Act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods" was the occasion for imposition of a tax. The Court concluded, therefore, the tax was one in form and substance upon exports and prohibited by the Import-Export Clause.

The latest case involving a direct tax on imports and exports themselves, other than the very late decisions particularly relied upon by the Appellants and hereinafter discussed, was *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945). There, the State of Ohio imposed ad valorem taxes on certain bales of hemp and other fibre brought from the Phillipine Islands. When assessed for the tax, the hemp and other fibres were stored in the original packages in which they had been imported in Ohio preliminary to their use by the taxpayer in the manufacture of cordage and other products. Again, upon the theory of *Brown v. Maryland*, *supra*, and upon the further holding that articles brought from the Phillipine Islands to the Continental United States constituted imports, the tax was condemned.

(2) Cases Involving Taxes on the "Process" of Importing and Exporting

The case to be considered under this sub-heading of the Appellees' brief are perhaps the most important referred to anywhere herein, for, as will be seen, these are the cases in which the language relied upon so heavily by the Appellants that the "process" of importing and exporting is exempted from taxation by the Import-Export Clause was developed. It is important to note in connection with each of these cases what act or document was the incident for the tax and particularly the relationship of the document or act to the article of import or export and the causal effect between a tax upon that act or document and the physical import or export itself.

Needless to say, it is now too late in the light of these cases to make the contention that the Import-Export Clause has reference only to physical imports and physical exports in themselves, notwithstanding that the language employed in the Constitution would logically lead to that conclusion.

In extending the protection of the Import-Export Clause to acts or documents other than the imports or exports themselves, it is submitted, this Court has consistently been guided by the comparatively limited scope of the language used in the Constitution itself. As appears from these cases, its use of the term "process" has not yet been to inject into the meaning of that word the usual meaning afforded it in every day speech and especially not the meaning afforded it in cases arising under the Commerce Clause, but rather such a specialized meaning as to constitute the word a word of art. When this principle is kept in mind in dealing with the following cases, the whole fallacy of the Appellants' argument that, in the abstract they were engaged in the importing and exporting process and that, consequently, gross receipts derived by them from these activities are tax exampt is brought to light.

In *Almy v. California*, 65 U. S. 169 (1861), a State stamp tax upon bills of lading was under consideration, as applied to bills of lading for the export of gold and silver. The validity of the tax was questioned upon the ground that, in substance and effect, the stamp tax imposed on bills of lading used for that purpose constituted a tax upon exports.

This contention was sustained by the Court in an opinion written by Mr. Chief Justice Taney, who stated:

> "* * * a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property

into the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. *A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported.* And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this is in direct opposition to the plain and express prohibition in the Constitution of the United States." (Emphasis supplied.)

The same result was achieved at a later date in *Fairbanks v. United States*, 181 U. S. 283, (1901), with respect to a stamp tax enacted by Congress in its application to an export bill of lading upon certain wheat exported from Minnesota to England. This later case, of course, arose under the provision of the Constitution denying to Congress the right to tax exports rather than the Import-Export Clause of the Federal Constitution, which applies only to the States.

In much the same vein as the holdings in the *Almy* and *Fairbanks* cases, *supra*, was the decision in the case of *Selliger v. Kentucky*, 213 U. S. 200, (1909). That case involved a State ad valorem property tax sought to be imposed on certain warehouse receipts owned by the defendant, issued for and on account of whiskey which was physically present in Germany. The decision of the Court proceeds upon the assumption that the goods themselves would not have been subject to taxation because they were

physically outside of the situs of the State and also because the property was an export. Upon the theory that the property itself, while in Germany or even while in Kentucky preliminary to its actual exportation would have been tax exempt, the Court held the warehouse receipts were tax exempt.

After the *Selliger* case came two decisions upon which the Appellants place special reliance. The first, *United States v. Hvoslef*, 237 U. S. 1 (1915), concerned a United States stamp tax as applied to certain charter parties. The tax had been imposed by the War Revenue Act of 1898. Thereafter, Congress had enacted legislation authorizing the refund of taxes illegally assessed or collected.

The charter parties were exclusively for the carriage of cargo from ports in the States of the United States to foreign ports and the imposition of the stamp tax was resisted upon the theory that it constituted a tax or duty imposed by Congress on articles exported from a State. The tax was held invalid as applied to the charter parties exclusively for the carriage of cargo from State ports to foreign countries. In reaching this conclusion, the Court referred to the constitutional prohibition against the imposition by Congress of taxes or duties on exports. It then stated:

> "The prohibition relates only to exportation to foreign countries * * * and is designed to give immunity from taxation to property that is in the actual course of such exportation * * *. This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the

framers of the Constitution that 'the process of exporting the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation'."

The Court reviewed at length its prior decisions and particularly the *Almy and Fairbanks* cases, *supra*, involving taxes nominally on articles or documents other than imports or exports but found to be, in effect, invalid taxes on imports or exports. It then concluded by saying:

"Instead of a contract for the carriage of a particular lot of goods occupying less than the entire cargo space, as in the case of an ordinary bill of lading, the charter party was a contract for the carriage of a full cargo lot. In legal principle, there is no distinction which can condemn the tax in the one case and save it in the other. Whether the contract of carriage covers a small lot, or a partial cargo, or an entire cargo, whether the goods occupy a part of the cargo space or the whole cargo space,—can make no constitutional difference. The charters were for the exportation; they related to it exclusively; they served no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."

Thames & Mersey Marine Insurance Co. v. United States, 237 U. S. 19, (1915), concerned the validity of the same tax considered in the *Hvoslef* case, as applied to contracts of marine insurance. As in the *Hvoslef* case and on its authority, the tax was also condemned as constituting a tax on exports.

The Court's opinion referred to the *Hvoslef* case, *supra*, and stated:

"* * * There the question was as to the validity of the tax upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports.

> and here the question is as to the tax upon policies insuring such exports during the voyage. Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? *It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported,* * * *" (Emphasis supplied.)

The Court then considered the use of Marine insurance in the carriage of goods to foreign countries. It found that the policy of insurance is "universally recognized as one of the ordinary 'shipping documents' ". It pointed out that during the war period of the Spanish American War the rise in rates for insurance affected exporting in the same manner as a rise in freight rates and concluded by saying:

> "* * * the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. *Such taxation does not deal with preliminaries, or with distinct or separable subjects: the tax falls upon the exporting process.*" (Emphasis supplied.)

It is extremely important to note that in both the *Hvoslef* and *Thames & Mersey* cases, *supra*, the services to be performed, carriage of goods by sea in the first case and marine insurance during such carriage in the second, were all to be performed outside of the continental United States. The use by the Court of the term "process of exporting" must necessarily be read and understood in the light of this factual background for, in substance and effect, the term "process" is used as a word of art to mean those transactions, in the case of exports, which begin at dock side. Seizure by the Appellants upon the use of the word, "pro-

cess" to extend to the carriage of articles subsequently to be exported within the continental United States is unwarranted insofar as it depends upon the decisions in these two cases.

(3) THE RICHFIELD CASE AND SUBSEQUENT DECISIONS

The Appellants place special reliance upon *Richfield Oil Corporation v. State Board*, 329 U. S. 69, (1946) and three decisions following it, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), *Empresa Siderurgica, S. A. v. County of Merced*, 337 U. S. 154 (1949); *Joy Oil Co. v. State Tax Commission*, 337 U. S. 286 (1949). These cases deserve special analysis to see what, if any, new constitutional doctrine they establish and how they fit in and complete the picture presented by earlier decisions.

The *Richfield* case was a sales tax case. The tax involved therein applied to retail sales as defined and was measured in amount by a percentage of the gross receipts derived from the sale. On the facts, the validity of the tax was resisted as applied to a sale of oil made by Richfield Oil Corporation to the New Zealand Government. The price fixed for the sale was f. o. b. Los Angeles; payment to be made, however, in London. Delivery was to the order of the Naval Secretary of New Zealand and was to be made at a designated naval tank steamer of the Government of New Zealand at Los Angeles. The seller carried the oil by pipe line from its refinery in California to storage tanks at the harbor where the New Zealand naval vessel appeared to receive it. Thereafter, the oil was transported to New Zealand and no portion of it was used or consumed in the United States.

In considering the tax as applied to this transaction, the Court held that it violated the Import-Export Clause. It pointed out that the Supreme Court of California had sus-

tained the validity of the tax on the authority of certain Commerce Clause cases which, in substance, held that non-discriminatory taxes imposed on interstate sales were not prohibited by the Commerce Clause. The Court stated that cases arising under the Commerce Clause and cases arising under the Import-Export Clause were not interchangeable because the two constitutional provisions under which they arise "are not coterminus". In some cases, the Court remarked, a State tax has been held unconstitutional both under the Import-Export Clause and under the Commerce Clause; but it pointed out the essential difference between the two clauses meant that, in Commerce Clause cases the Court could sustain a tax applicable to interstate commerce if it found that it did not discriminate against, exact a tax for the privilege of engaging in or unduly burden such commerce, while, because of the specific language of the Import-Export Clause, "any" tax which constituted a tax on imports or exports was prohibited.

After this general statement, the Court stated that it was faced primarily with the question of whether the Oil constituted an export within the meaning of the constitutional provision. It reviewed earlier cases and, with specific reliance on the *Spalding & Bros.* case, *supra*, it held that "* * * the commencement of the export would occur no later than the delivery of the oil into the vessel". Upon that fact and the further finding that the tax constituted an impost, the statute, as applied to the transaction outlined, was condemned.

It is obviously apparent that the *Richfield* case established no new constitutional doctrine. It was but a continuation and logical extension of the cases involving direct taxes on imports and exports considered herein. The State admitted that the sale would have been exempt if the oil

had been delivered to a common carrier. *The actual point decided was that the delivery to the vessel of the Vendee began the Export.*

Subsequent to the *Richfield* case, came the decision in the *Carter & Weekes* case, *supra.* At the outset, it is important to note that this latter case was decided by the majority of the Court without any reference whatsoever to the Import-Export Clause, with the result of splitting the Court, although as plainly appears from the summary of the argument made to the Court in the Lawyers' Edition Report of the case (91 L. Ed. 993), the Import-Export Clause was argued to the Court.

This case involved the validity of an occupation tax measured by gross receipts as imposed on a company engaged in stevedoring operations. The service performed by the company had to do with the loading and unloading of imports and exports. The majority of the Court, as before stated, without any reference to the Import-Export Clause concluded the tax was invalid since it imposed an undue burden on foreign commerce and thus violated the implied prohibition contained in the interstate and foreign Commerce Clause of the Constitution. Mr. Justice Black dissented in toto from the majority opinion. Mr. Justice Douglas, Mr. Justice Rutledge and Mr. Justice Murphy dissented from the sole proposition contained in the majority opinion that the tax violated the Commerce Clause. Mr. Justice Douglas and Mr. Justice Rutledge concurred in part with the majority on the ground that the portion of the proceeds of the gross receipts derived from the loading and unloading of imports and exports was unconstitutional as in violation of the Import-Export Clause. The full text of their opinion on this latter point is contained in the Appellant Canton's brief, page 44, and will not be repeated here. In short, it was based upon the approach adopted by

both Appellants in the case at bar that loading and unloading are part of the exporting process and the Import-Export Clause prohibits not only taxes on imports and exports but safeguards all processes of, agents and instrumentalities engaged in the handling of imports and exports from taxation.

Needless to say, the case is not any authority for contentions founded upon the Import-Export Clause since the majority of the Court, with the result of creating a split and sharp dissent among its members, did not base its decision upon the Import-Export Clause or even mention that Clause although the point was argued to them.

The Appellants seek to convert the actual vote of the Court on the main point decided (5 to 4) into a 7 to 2 decision based upon the Import-Export Clause. Their reasoning is that a state tax may survive the Commerce Clause and not the Import-Export Clause, but the converse is not true. In this connection, the Appellants are basing their argument upon the statements contained in the partially concurring and partially dissenting opinion of Mr. Justice Douglas, with whom Mr. Justice Rutledge agreed, but with whom Mr. Justice Murphy and six other members of the Court failed to agree.

While it is true that Mr. Justice Douglas did state "* * * a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause", this language must be read in connection with the language employed by him in writing for the majority of the Court in the *Richfield* case, *supra*, when he said:

> "The two constitutional provisions, while related, are not coterminus. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. * * * But

there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns no wise on whether the article was, or had ever been, an import or export. * * * Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. * * * the scope of limitation [of the Commerce Clause] has been determined by the court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. * * * That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits * * * and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. * * *

"It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection laws'. The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. *As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other.*" (Emphasis supplied.)

When the actual language employed in the Import-Export Clause is considered, together with the background decisions construing that Clause prior to the *Richfield*

case, the proposition contended for by the Appellants is without merit. The Import-Export Clause is phrased in words of taxes upon articles themselves. Obviously, as a practical matter and in order to preserve substance rather than form, the Supreme Court has condemned taxes under the Import-Export Clause which nominally purported to be on transactions or documents related to imports and exports and not on the articles themselves, although, in substance, the very imports and exports themselves were being taxed. In so doing, as has been shown before, the Supreme Court has on several occasions employed the phrase, the "process" of importing and exporting. The use of the word "process" in that language, however, has been an artful use and not a generic use, because obviously the Import-Export Clause, cast in the language adopted by the draftsmen of the Constitution, could not mean that in the generic sense every aspect of the process of importing and exporting is tax exempt. In this connection, the dissent of Mr. Justice Black in the *Richfield* case is important for there, in speaking of the Import-Export Clause, he stated flatly: "It was not intended to bestow a bounty or blanket tax immunity upon all those who engage in the production, processing, purchase, or sale of goods shipped abroad. There was no broad purpose of encouraging foreign commerce by making all these preliminary steps tax free."

As is true with respect to the *Richfield* case, *supra*, the *Empresa Siderurgica, S. A.* case, *supra*, likewise establishes no new constitutional doctrine. There, the question presented involved the application of a State personal property ad valorem tax as applied to a cement plant, in California, which had been sold in its entirety to a Columbian corporation for export to South America. The tax was imposed upon part of the plant at a time when title has passed, pos-

session taken by the purchaser and a company which was a common carrier employed to do the dismantling and packaging for shipment.

The principal problem presented by the case was whether or not the tax could be said to apply to an export. In other words, the Court was required to decide whether, on the state of facts that the plant was being disassembled and shipped to South America, the plant and its component parts could be said to constitute an export within the meaning of the Import-Export Clause and thus be exempt from the tax.

The Court decided that on the date of finality for tax purposes the facts did not establish that the plant and its component parts constituted exports. Accordingly, it held that imposition of the tax was proper. In so doing, it repeated its earlier general statements that the tax immunity under the Import-Export Clause "* * * runs to the process of exportation and the transactions and documents embraced in it. * * *". As authority for its statement, it relied upon the *Fairbanks, Thames & Mersey and Hvoslef* cases, *supra*, which, as have been shown, demonstrate that the word "process" is a word of art rather than one of generic meaning, as used under the Commerce Clause.

The *Joy Oil Company* case, *supra*, likewise concerned a personal property ad valorem tax. There, the taxpayer had purchased gasoline for export and in order to secure the benefits of lower export freight rates and exemption from the Federal transportation and manufacturers' excise taxes, had had the gasoline transported from Grand Rapids, Michigan, to Detroit, Michigan, where it was accumulated in storage tanks. From Detroit, the gasoline was to be shipped to Canada by water. However, the gasoline was stored in Detroit for some fifteen months due to the taxpayer's ina-

bility to obtain shipping space on a water carrier, and during this time the tax was assessed.

The Court sustained the validity of the imposition of the tax on the theory that, while the gasoline was stored in Detroit it could not be said that it constituted an export because the gasoline might have been diverted to domestic markets and, in substance, the facts did not establish, beyond peradventure of doubt, that the gasoline would inevitably and eventually be shipped to Canada. Four Justices dissented from the majority holding in this case. Their dissent proceeded on the assumption that all of the facts indicated that the gasoline in question would, in fact, be exported at a subsequent date; that, therefore, it had at the time of shortage acquired the tax exemption afforded an export; and, hence, the imposition of the tax was improper.

This case too, as has been seen from the above recital, involved a direct tax on an article itself. As such, the problem presented to the Court was a determination of whether the finality date for the tax occurred before the date that the article acquired its status as tax exempt or thereafter. The case establishes no new constitutional doctrine. It is but a logical extension of the decisions of the earlier cases involving direct taxes on exports themselves and a determination on a highly controversial set of facts as to when, in point of time, certain designated articles acquired a tax exempt status.

Neither the *Richfield* case nor these subsequent decisions afford comfort, when considered in the factual aspects of their holdings, to the Appellants *for none of them condemn, under the Import-Export Clause, a tax imposed upon a person other than the owner affording transportation services to articles which, in the geographical sense, will subsequently become exports or previously have been imports.*

None of the decisions have gone this far, nor is any language contained therein, when considered in its context or on the basis of the authorities cited to support it, indicative that the result contended for by the Appellants is the proper one to reach. While it is true that the problem presented by cases arising under the Commerce Clause differs from the problem presented by cases arising under the Import-Export Clause in that in the former a tax may be sustained which ultimately effects interstate or foreign commerce but does not unduly burden it, tax the privilege of engaging in the business or discriminate against it, while in the latter a tax which touches an import or export, itself, is invalid regardless of the extent of the burden, the difference is but a matter of degree. *In each instance, the problem is the scope of the protection; and in solution of the problem, one need find with respect to the Import-Export Clause, only that the tax is on, or substantially on, the import or export while a higher degree of proof is necessary to condemn a tax under the Commerce Clause.*

As has been noted, the Commerce Clause, in affording tax immunity, applies to the process, in the generic sense, of interstate or foreign commerce. The Import-Export Clause, however, is cast, in the words of the Constitution and in the decisions construing it, in terms of articles or transactions and documents so directly connected with the articles as to become a part thereof. The cases decided under the Import-Export Clause demonstrate that not all steps in the transactions involving importing and exporting and all property employed in that activity are tax exempt. Thus, the Import-Export Clause has some limits to its application. That its limits are somewhat short of affording tax immunity to the activities performed by the Appellants, it is submitted, is the only conclusion which can be reached by careful analysis and consideration of all authorities.

There are many other analogous situations in which this Court has held valid taxes whose incidence was indirect or oblique in relation to a constitutionally immune object but in which the charge was that they taxed the "process" of doing Federal business or imposed a prohibited direct tax. *Alabama v. King and Boozer*, 314 U. S. 1 (1941) and *Curry v. United States*, 314 U. S. 14 (1941), overruled prior cases which had prohibited taxes on purchases by the United States, even though the incidence of the tax was on the seller and not on the government. It is now the rule that the constitutional immunity of the Federal Government to taxation by the States does not prohibit a tax on the seller of goods to the government even though the government's cost of doing business is thereby increased.

Likewise the absolute immunity of one Sovereign and its functions and activities, from taxation by the other as between the Federal Government and the States is not violated by an income tax on employees. *Graves v. New York*, 306 U. S. 466 (1939); *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

Another line of cases is *Home Insurance Company v. New York*, 134 U. S. 594 (1890); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); and *Educational Films Corp. v. Ward*, 282 U. S. 379 (1931). In the *Stone Tracy* case, the Federal tax was an excise on the doing of business in a corporate capacity equivalent to one percent of the entire net income. It was held that the income on exempt State municipal bonds owned by a corporation could constitutionally be taxed. The Court held that:

> "* * * where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the in-

> come from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property."

In the *Home Insurance Company* case, *supra*, a state statute imposed a corporate franchise tax and reference was made to the capital stock and dividends for the purpose of determining the amount of the tax. A charge was made that this amounted to a tax on United States bonds forming part of the capital of the insurance company. It was held that the value of the United States bonds could be used as a measure of the tax exacted for the privilege of doing a corporate business.

In *Educational Films Corporation, supra*, the same question was involved as in the *Home Insurance* case. The court cited the *Stone Tracy* and *Home Insurance* cases as holding that these cases had reaffirmed

> "* * * the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on government instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income."

The Court then cited many other analogous holdings. Included are *Peck v. Lowe, supra, Maine v. Grand Trunk, supra.*

There can be little surprise, therefore, that in a case directly considering the problem here presented, the scope of the protection afforded by the Import-Export Clause was directly limited in accordance with the principles set forth

in the cases heretofore cited, *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 9 cir., 96 F. (2d) 412 (1938).

That case involved the validity of a so-called inspection fee, denominated by the Supreme Court in hearing the case on appeal as a tax, in the amount of one-twentieth of one percent of the gross receipts of public utilities and one-fiftieth of one percent of the par value of the utilities' outstanding stock, to pay the cost of operating the Public Utilities' Commission, established by Act of the Territory of Hawaii. The suit was brought to enforce payment of the tax for the seven year period from 1923 to 1930. During that period, the Utilities Commission had operated at a deficit exceeding $38,000, but if the taxpayer had paid its taxes there would have been over $13,000 in excess receipts over and above the expenses of the Commission.

Among other grounds, the taxpayer, a common carrier by water, resisted payment of the tax on the theory that it infringed the Import-Export Clause since the taxpayer was engaged in the business of transporting exports and imports between ports of the Territory of Hawaii for transshipment to and from foreign countries. The contention was rejected, the Court saying:

> "It is next contended that the fees are an unconstitutional burden on imports and exports. Article 1, section 9, of the Constitution, provides that: 'No Tax or Duty shall be laid on Articles exported from any State.' Article 1, section 10, provides: 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.' Appellant says that these clauses 'forbid not only property taxes but any fees, charges or occupation taxes which in substance and effect burden imports or exports.' See Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 227, 53 S. Ct. 373, 375, 77 L. Ed. 710. Assum-

> ing, without deciding, that the clauses are applicable to a Territory, we think such a rule has no application here. The fees are not laid on the property imported or exported, on the proceeds thereof, or on the privilege of importing or exporting. The fact that appellant must pay a fee based on receipts from transporting articles imported and exported by others, has only an indirect and remote effect, if any on the imports or exports. * * *"

Subsequently, the case was affirmed in the Supreme Court, 305 U. S. 306 (1938). In the Supreme Court, the Import-Export Clause argument was not advanced nor considered.

The Appellant Canton seeks to distinguish the effect of this decision on the theory that the fee constituted no more than a reasonable inspection fee and thus falls within the one exception contained in the Import-Export Clause. As before stated, the Supreme Court did not treat the payments to be made as fees, but rather denominated them as taxes. Moreover, the United States Court of Appeals did not sustain the validity of the tax upon the theory that it constituted a necessary inspection fee. In this connection, it should be stressed that the exception to the Import-Export Clause is phrased in terms or exactions which are "absolutely necessary" for executing inspection laws. Had the carrier in that case paid the amounts exacted by statute, in fact, the amounts collected by the Territorial Government, and particularly the Public Utilities Commission, would have exceeded the expenses of enforcing the law. It is submitted that the Appellant Canton's attempted distinction of this case is without avail.

CONCLUSION

It has been shown, it is submitted, that the validity of the Maryland gross receipts tax, insofar as it applies to that portion of the gross receipts of the Appellants derived from transportation and other related services within the State of Maryland to articles subsequently to be exported or previously imported, is beyond question for the dual reasons that the tax is a valid franchise tax in lieu of other State taxes; and even if considered as a tax directly upon the gross receipts, is not within the scope of the protection afforded by the Import-Export Clause. Accordingly, it is confidently believed that the decree in the consolidated cases appealed from should be affirmed.

Respectfully submitted,

HALL HAMMOND,
Attorney General,

HARRISON L. WINTER,
Asst. Attorney General,
Attorneys for Appellees,
1901 Mathieson Building,
Baltimore 2, Maryland.